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The United States Senate

Report of Proceedings

Hearings held before

The Select Committee on Intelligence

S. 2525

Washington, D.C.

Wednesday, June 21, 1978

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MEMORANDUM FOR THE RECORD

SUBJECT: 21 June 1978 Intelligence Charter Hearing

1. On 21 June 1978 the undersigned attended subject hearing at which testimony was received from:

--Thomas I. Emerson, Lines Professor of Law Emeritus,
Yale University, and

--Robert H. Bork, Former Solicitor General, presently
of Yale Law School

2. In his testimony Professor Emerson focused on the activities of the intelligence agencies within the borders of the U.S. and their impact upon the civil liberties of American residents and made the following points in that regard:

--Mr. Emerson identified the First Amendment concern involved in S. 2525 as the issue of where to draw the line between collection of information for legitimate purposes and collection of information which violates constitutional rights.

--Having identified the issue Mr. Emerson stated that where intelligence operations relate to political expression and have a chilling effect, such operations must be confined to searching for data which has a direct and immediate relation to the violation of a criminal statute.

--Additional limitations are imposed upon the intelligence agencies by the Fourth Amendment and by the constitutional right of privacy.

--Mr. Emerson stressed that in his opinion the requirement of issuing of a warrant evidencing a judicial determination of probable cause and "particularly describing the place to be searched, and the persons or things to be seized" should not be relaxed or abandoned because the Government is involved in a search for "foreign intelligence"; Mr. Emerson would have this requirement apply to American citizens abroad and to non-resident aliens in the U.S.

--Mr. Emerson concluded, through an examination of constitutional law as interpreted in case law, that the Executive Branch possesses no inherent power to deviate from constitutional requirements because the intelligence agencies are dealing with "foreign intelligence activities."

--Mr. Emerson concluded by saying that S. 2525, like other legislation concerned with national security, must not include provisions which allow the President to disregard constitutional rights or to ignore at will the established law of the land.

3. Mr. Bork in turn emphasized the following matters:

--Mr. Bork began by raising doubts about three aspects of S. 2525 from a legal and policy viewpoint:

--the attempt to control the details of intelligence operations;

--the introduction of judges and a warrant procedure into the conduct of foreign intelligence surveillance, electronic and otherwise; and

--the amount of reporting to groups outside the Intelligence Community.

--With regard to the detailed control of intelligence activities, Mr. Bork stated that this aspect seems to him to be not only unwise but, in all probability, unconstitutional in that it invades Presidential powers under Article II of the Constitution.

--Mr. Bork found many of the provisions of S. 2525 to be overly rigid attempts to safeguard First and Fourth Amendment rights. He stressed that application of the First and Fourth Amendments, like all the great provisions of the Constitutions, depends heavily upon particular circumstances and the weighing of particular facts and the interests involved--flat rules announced in advance are not sufficiently sensitive to these problems.

--Mr. Bork emphasized that while there can be no dispute that constitutional rights must be preserved and no dispute that intelligence agencies must not be allowed to slip out of control, in his opinion there are ways of doing that that are substantially less threatening to constitutional values and to national security than the enactment of complex and detailed legislation.

--Mr. Bork advised that Executive Branch guidelines already developed should be allowed to pass the test of time before legislating detailed controls of dubious constitutionality; in this regard Mr. Bork stressed that such Executive Branch guidelines are fully responsive to First and Fourth Amendment concerns.

--Mr. Bork posed Article II estoppel questions and Article III "case or controversy" questions with regard to the introduction of judges and warrants into the intelligence process.


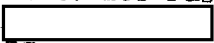
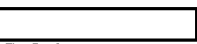
--Mr. Bork stated that the reporting requirements of S. 2525 seem to spread American intelligence information so broadly as to ensure leaks and diplomatic complications; he recommended a single joint congressional committee so that leaks could be more closely held.

--Mr. Bork concluded by saying that abuses of the past have been cured; the experiences of the past few years and Executive Branch guidelines now in place adequately guard us for the future. Mr. Bork urged that the effectiveness of American intelligence not be hampered further by drafting a complex code that by its nature cannot adequately address the unknowable problems and circumstances of the future.

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